

Kaur (Migration) [2024] AATA 4019 (9 October 2024)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Manveet Kaur

CASE NUMBER: 2317077

HOME AFFAIRS REFERENCE(S): BCC2023/4071404

MEMBER: Gabrielle Cullen

DATE: 9 October 2024

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 09 October 2024 at 12:05pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – incorrect information and bogus document provided with visa application – fixed term deposit in name of father – document examination showed fraudulent generation – application prepared by husband, now separated – initial claim that funds available at time of application and grant of visa but later withdrawn by father for business – later concession that information incorrect and document bogus – discretion to cancel visa – fixed deposit held by mother would have been sufficient – unsatisfactory course progress, cancellation of enrolment and enrolment in vocational course in different subject area – no-study and no-work conditions since visa cancelled – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1)(b), 98, 99, 101(b), 103, 109(1), 359AA, 375A
Migration Regulation 1994 (Cth), r 2.41, Schedule 2, cl 500.214

CASE

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s 109(1) of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a national of India. On 23 February 2023 the applicant applied for a Student (Higher Education Sector) (Subclass 500) visa as the primary applicant which was granted on 6 March 2023 valid to 2 May 2025. She applied together with her spouse as a member of her family unit. She arrived in Australia on 23 March 2023.
3. On 13 September 2023 the delegate sent the applicant by email a Notice of Intention to Consider Cancellation (NOICC) of her Student visa.
4. On 28 September 2023 the applicant responded to the NOICC as outlined below.
5. On 18 October 2023 the delegate cancelled the applicant's Student visa under s 109 on the basis that she had not complied with s 101 and s 103 of the Act as she had provided incorrect information and a bogus document to the Department as part of her Student visa application submitted on 23 February 2023. A no-study condition was placed on her visa.
6. On 24 October 2023, the applicant applied to the Tribunal for a review of that decision and attached the Department decision to cancel the visa.
7. The applicant appeared before the Tribunal via video on 30 September 2024 to give evidence and present arguments. She was assisted with an interpreter in the Punjabi and English languages when required. She elected to speak in English at times but was advised at any time she did not understand and could not communicate effectively to utilise the interpreter, which she did on occasion.
8. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.
9. **s.375A Non- Disclosure Certificate**
10. On 21 August 2024 the Tribunal wrote to the applicant advising that there is a s 375A Non-Disclosure Certificate on the Department's file which it considered is valid. It outlined in the letter the basis why the disclosure of the material it contains would be contrary to the public interest as contained in the Certificate. The applicant was given until 4 September 2024 to comment on or make submission in relation to the validity of the certificate.
11. At the hearing the Tribunal advised that it considered the Certificate to be valid. It referred to its previous letter sent to the applicant which outlined the reasons given by the Department for the non-disclosure of the information. The applicant at hearing did not comment on or dispute the validity of the Certificate.
12. The Tribunal outlined at hearing via s 359AA the gist of the information it covered. It noted it related to communication from the Department's Document Examination Unit (DEU) regarding advice that the Fixed Term Deposit document from Yes Bank in the name of her father is a fraudulent generation. The Tribunal noted that the information indicates that the DEU advised that 28 visa applications contained the Fixed Term Deposit created from the

same template, with the fixed text the same, including the signature as well as the distinct mark on the left edge and the uneven edge of the bottom of the document.

13. The applicant responded that her former partner prepared the application, and she did not know about the provision of this document. She said the document refers to her father holding funds in YES Bank but he has never had an account with that bank. Her response is further considered below.

CONSIDERATION OF CLAIMS AND EVIDENCE AND FINDINGS

14. Section 109(1) of the Act allows the Minister to cancel a visa if the applicant has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
15. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the applicant under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

Did the notice comply with the requirements in s 107?

16. The Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the notice issued under s 107 complied with the statutory requirements.

Was there non-compliance as described in the s 107 notice?

17. The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s 107 notice was non-compliance with s 101 and s 103.
18. The applicant provided the Tribunal with a copy of the Department's Decision Record dated 18 October 2023.
19. The information indicates that on 23 February 2023 the applicant applied for a Student (Higher Education Sector) (Subclass 500) visa as the primary applicant which was granted on 6 March 2023 valid to 2 May 2025. Her spouse, Mr Jagroop Singh, applied as a dependent applicant and was also granted the visa.
20. In the NOICC dated 13 September 2023, as recorded in the Department decision of 18 October 2023, the delegate set out the particulars of the possible non-compliance with s 101(b) and s 103 on the basis of incorrect information provided to the Department and a bogus document. It raised with the applicant that the Department reasonably suspects she has provided a bogus document with her application made on 23 February 2023 within the meaning of s 5(1)(b) as the document is counterfeit or has been altered by a person who does not have authority to do so.
21. The Department decision notes that in the NOICC the delegate set out the particulars of the non-compliance being that in the application for the Student visa provided the following answers.

Under the heading 'Funding for stay', the applicant provided the below answers (in bold):

Do all applicants in this application confirm that they each have access to sufficient funds to support themselves for the total period of stay in Australia and understand that further evidence of funds may also be requested?

Yes

Show how each applicant included in the application will support themselves in Australia to meet living, tuition and school costs. Select

Financial support from an individual

Under the heading 'Financial support from an individual' the visa holder provided the following responses (in bold):

Will the funds be provided by an individual other than the applicant?

Yes

Relationship to the applicant: **Parent**

Funding type: **Deposit in financial institution**

Value in Australian dollars **56645**

(whole dollars only)

Financial institution: **YES BANK**

Under the heading 'Declarations', the applicant provided the following answers (in bold):

The applicants declare that they:

Have provided complete and correct information in every detail on this form, and on any attachments to it.

Yes

Understand that if documents are found to be fraudulent or information to be incorrect after the grant of a visa, the visa may be subsequently cancelled.

Yes

22. The delegate noted that the applicant attached the following document in support of the application.

Yes Bank fixed term deposit certificate, dated 30 January 2023 with the following details:

Name: Mr Rashpal Singh

Account number: 047952000008408

Maturing date: 25 November 2023

Maturing amount: INR3362866

23.

24. The NOICC as recorded in the Department decision noted that on 6 July 2023, the Department's DEU conducted document examination on the YES Bank deposit statement provided with the visa application. Their analysis of the document confirmed that it is not a genuine document. The reasons for that finding was raised with the applicant via s 359AA as outlined above.
25. Based upon this information the delegate outlined in the NOICC that they considered the applicant had provided incorrect answers and not complied with s 101(b) in the Student visa application lodged as follows:
- provided details of access to funds for her intended stay in Australia under the section of the application form titled 'Funding for stay' and 'Financial support from an individual'; and
 - answered 'Yes' to the question 'Have provided complete and correct information in every detail on this form, and on any attachments to it' under the heading 'Declarations'.
26. The delegate also considered that that she had not complied with section 103 of the Act because based on the information from the DEU the YES Bank fixed term deposit certificate, dated 30 January 2023, is bogus within the meaning of S 5(1)(b) in that it is counterfeit or has been altered by a person who does not have the authority to do so.
27. In response to the NOICC the applicant submitted a Statutory Declaration dated 27 September 2023 and submissions noting the following.
- There is insufficient information or investigations made by the Department to form a positive satisfaction that she has not complied with s101(b) and s 103.
 - She did not complete the application form in a way that incorrect answers were given or provided. She did not give, submit, tender or manufacture bogus documents with the application.
 - The YES Bank fixed term deposit certificate was submitted as evidence of funding with the Student visa application, which was granted on 6 March 2023. The document was accepted as genuine at that time by the Department.
 - There were funds available in the above YES Bank account at the time of the application which were later withdrawn by the applicant's father as he had to salvage his business. The funds stated in the YES Bank deposit statement were not available when the Department's Document Examination Unit conducted the document examination on 6 July 2023.
 - The Department has not conducted a verification check of the YES Bank deposit statement with YES Bank. The Department should have conducted further verification checks on the funds in the YES Bank deposit statement. The authenticity of the YES Bank deposit statement cannot be solely based on the findings of the Department's Document Examination Unit.
 - The Department has not provided evidence that the YES Bank document is bogus. The non-compliance particularised in the NOICC is not sufficiently detailed in order to demonstrate the visa holder provided incorrect information and bogus documents in the Student visa application.

- She has utilised some of the funds from the YES Bank account to pay for the first semester of her fees.
- If the Department had conducted their own investigation and checks they would have confirmed the legitimacy of the document.

28. In support of the statement, the applicant provided:

- A submission addressing the NOICC dated 13 September 2023 by her former representative who noted that the YES Bank account fixed term certificate dated 30 January 2023 had the funds prior to the applicant's arrival in Australia and at the time the visa was granted on 6 March 2023 but due to issues in the family business the funds were withdrawn. The representative also referred to Court cases where the Tribunal had not attempted to establish by making an inquiry whether the document had or had not been issued from the source. He submitted that the Department should have made inquiries of YES bank as to the genuine nature of the document rather relying on information from the DEU. He submitted that no evidence has been provided that the YES Bank has stated that the fixed deposit certificate was not genuine or bogus. He stated that the applicant declared that she did not provide false, misleading or bogus documentation in support of her visa application.
- Federal court documents in relation to other cases submitting that it is not reasonable for the Department to make the finding based on the information from the DEU that incorrect information and a bogus document were provided.
- CoE dated 18 February 2023 for the applicant to study a Master of Information Technology at Sydney Institute of Higher Education.
- Various financial documents: including a letter and Deposit Statement issued by YES Bank in the name of the applicant's mother, Dalwinder Kaur showing available funds of 24,00,000INR as at 5 November 2022 in a 12 months fixed deposit account, created on 5 November 2022 with maturity date on 5 November 2023.
- Affidavit by the applicant's mother, Dalwinder Singh dated 25 September 2023 noting that they, the applicant's parent provided the YES Bank document at the time of the visa application and the document was genuine. Ms Singh notes that her husband, Mr Rashpal Singh was facing significant losses while running a restaurant and had to undertake renovation work so removed the funds. She submits she had and has sufficient funds in her YES Bank account to support the applicant's studies in Australia.
- Income tax returns of Dalwinder Singh showing an income of 386530INR in year ended 31 March 2020, 352475INR for year ended 31 March 2019.
- Former Tribunal decisions setting aside the decision to cancel the visa.
- Asset valuations and pictures of restaurant renovations.

29. On 18 October 2023 the delegate considered the submissions but cancelled the applicant's Student visa under s 109 on the basis that the applicant had not complied with s 101(b) and s 103 of the Act as she had provided incorrect information and a bogus document to the Department.

30. At hearing the Tribunal outlined in detail the issues before the applicant as outlined above, including the outcome of the verification check undertaken by the Department's DEU, and that it may find she did not comply with s 101(b) in that the funds information and details of

that funding provided in the application are incorrect. The Tribunal referred to s 5(1)(b) and that a bogus document is one where the Tribunal reasonably suspects it is counterfeit or has been altered by a person who does not have authority to do so. It referred to the evidence from the DEU which may lead it to reasonably suspect the YES Bank Fixed Term Deposit in the name of her father submitted with the application is a bogus document within the meaning of s 5(1)(b).

31. The applicant stated that she had nothing to do with preparing, completing and submitting the application for the visa including referring to in the application and submitting the YES Bank Fixed Deposit Certificate in the name of her father. She said this was done by her husband, with whom she is no longer in relationship and has not been since a couple of months after she arrived in Australia. She said a few months prior she had submitted an application for a divorce. She said and confirmed her father had never had funds in a fixed deposit account with YES bank as claimed and submitted with the application. She said at the time she was living with her in-laws and her husband spoke to the agent and she was not involved. Her husband told her he would manage it, he acted on her behalf and she did not know what was filled in or the documents that were provided. She confirmed that her father did not ever hold funds in the YES Bank as outlined in and attached to the application.
32. The Tribunal asked why she did not provide this information in the response to the NOICC, particularly in her Statutory Declaration submitted in response to the NOICC. The Tribunal noted that her evidence in her Statutory Declaration and in submissions was that the information was correct and the document was genuine, and her father had withdrawn the funds soon after to salvage his business including to pay for renovations on the family restaurant. It questioned the credibility of her evidence. The Tribunal questioned due to the inconsistency in her evidence whether she did not know of the provision of the incorrect information and bogus document.
33. She said she went to a migration agent when she received the NOICC, she wanted to stay and study in Australia for her future and he advised her to submit the above. She then said her English was not good.
34. The Tribunal raised with the applicant that whether she knew or did not know of the provision of the incorrect information is not relevant because under s. 98, an applicant who does not fill in his application form is taken to do so if s/he causes it to be filled in or if it is otherwise filled in on her behalf and under s.99 of the Act any information that the applicant gave or provided or caused to be given or provided on her behalf, to an authorised system (the online application) is taken for the purposes of s.101(b) to be an answer to a question in the applicant's application form. Further, it raised with her that s.100 provides that an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.
35. It also raised with her that it appears that she allowed her husband to act on his behalf and relied entirely on him to take care of the application without checking or verifying what was being lodged on her behalf. It raised with her that in these circumstances, the Tribunal may find that she has provided, or caused to be provided, to an officer, authorised system or the Minister a bogus document within the meaning of s 5 (1)(b).
36. The Tribunal discussed with the applicant the discretionary criteria, and her evidence is outlined and considered below.

37. *Consideration*

38. The Tribunal has considered all of the submissions and documents she has submitted as outlined above, however, for the reasons that follow the Tribunal is of the view that the applicant provided incorrect information as to access to funds for her intended stay in Australia under the section of the application form titled 'Funding for stay' and 'Financial support from an individual'. This indicated a parent would be providing the funds with a Deposit in YES Bank, in the sum of \$56,645. For the reasons that follow it also finds she incorrectly answered 'Yes' to the question 'Have provided complete and correct information in every detail on this form, and on any attachments to it' under the heading 'Declarations'. Further, for the reasons outlined below, it reasonably suspects the Fixed Deposit certificate dated 30 January 2023 issued by YES Bank, Account number: 047952000008408, in the name of Rashpal Singh with principal amount of INR320000 as at 25 November 2021 and maturity amount of 3362866INR, with maturity date of 25 November 2023 is a bogus document as defined in s 5(1)(b) of the Act, as it reasonably suspects it is counterfeit or has been altered by a person who does not have authority to do so.
39. Firstly, the Tribunal places significant weight on the evidence as outlined in the NOICC and raised with the applicant via s359A at hearing that the DEU having examined the document advised that the document is a fraudulent generation for the reasons outlined above. The Tribunal accepts the DEU has expertise in document examination.
40. Secondly, the Tribunal places significant weight on the applicant's evidence at hearing that her father, Rashpal Singh has never held funds in YES Bank and the fixed term deposit certificate in the name of her father is not genuine and the information referring to this in the application is incorrect.
41. Specifically, the term 'counterfeit' is not defined in the Act or Regulations. The Macquarie Dictionary provides a definition for 'counterfeit,' which the Tribunal considers pertinent and applicable to the provisions of s 5(1), as follows:

adjective **1.** made to imitate, and pass for, something else; not genuine: *counterfeit coin*.

2. pretended: *counterfeit grief*.

–*noun* **3.** an imitation designed to pass as an original; a forgery.

4. *Archaic* a copy.

5. *Obsolete* a likeness; portrait.

–*verb* (t) **6.** to make a counterfeit of; imitate fraudulently; forge.

7. to resemble.

8. to simulate.

–*verb* (i) **9.** to make counterfeits, as of money.

42. The Tribunal has formed the view that there is a reasonable suspicion that the Fixed Deposit Summary in the name of the applicant's father submitted with the application for the visa the subject of the s 107 notice is a document that has been made to imitate and pass for, something else other than a genuine representation of funds the applicant's father held at the time. It finds it is a bogus document within the meaning of s 5(1)(b).
43. It also finds for the reasons outlined above that the information provided in the application for the visa as to funding referring to the details in this document is incorrect.
44. In making this finding it has considered all the submissions made in response to the NOICC including her Statutory Declaration, the affidavit from the applicant's mother, photos,

submission from her representative and her statutory declaration, claiming that the YES Bank Fixed Deposit certificate is genuine, that the funds were withdrawn soon after the application for this visa for the reasons claimed, she used some of the funds to pay her course fees, that the Department accepted it as genuine at the time of the grant of the visa and the Department should have verified the genuine nature of the document with YES Bank. However, it places more weight on the evidence of the DEU and the applicant's oral evidence at hearing that the document is not genuine and the information provided in response to the NOICC as to the genuine nature of that document was prepared by her migration agent. At hearing she gave evidence that she went to the agent and he advised her to take that course. She said she wanted to stay and study in Australia for her future and he advised her to submit the above. She then said her English was not good.

45. On the basis of the applicant's evidence at hearing, the Tribunal does not consider it necessary as raised in the response to the NOICC to contact the YES Bank to verify the document. It has also considered the various Tribunal and judicial cases and arguments submitted but is of the view that as the applicant has now indicated the document is not genuine, they no longer apply. It views the circumstances in the matter before the Tribunal are different to those outlined in the submitted Tribunal decisions and Court cases.
46. While at hearing the applicant accepted the document was not genuine and the information as to funding in the manner outlined above was incorrect in the application for the visa she indicated she was not aware the bogus document and incorrect information had been submitted as her husband, with whom she separated from soon after arriving in Australia, prepared with the agent the application for their visas, including on her behalf. The applicant's evidence is that she was not personally involved in the preparation of the bogus document and was unaware of that. The Tribunal accepts the applicant's evidence that her husband completed the application form and submitted the Fixed Term certificate from Yes Bank in the name of her father, working with a migration agent in India. The evidence before the Tribunal is that the applicant relied entirely on her husband, who was also an applicant for the visa, without concern, to prepare and lodge the visa application on her behalf. The Tribunal is of the view the applicant had little concern or interest in what information and documents were being provided.
47. Whether the applicant knew or did not know of the provision of the incorrect information is not relevant because under s. 98, an applicant who does not fill in their application form is taken to do so if she causes it to be filled in or if it is otherwise filled in on her behalf and under s.99 of the Act any information that the applicant gave or provided or caused to be given or provided on her behalf, to an authorised system (the online application) is taken for the purposes of s.101(b) to be an answer to a question in the applicant's application form. Further, s.100 provides that an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.
48. Therefore, as her spouse at the time and the dependent applicant was acting on her behalf the information is therefore incorrect even if the applicant did not know that it was incorrect. It is therefore not relevant, for the purpose of establishing whether there was non-compliance as described in the NOICC, whether or not the applicant had knowledge of the information that was provided on her behalf by her partner at the time. Further, s.101 of the Act puts the onus on the applicant to fill in or complete her application form in such a way that all questions on it are answered and no incorrect answers are given or provided.
49. On the evidence before it, the Tribunal is satisfied that the applicant had allowed her husband, the dependent applicant at the time to act on her behalf and relied entirely on her husband working with the agent to take care of the application without checking or verifying what was being lodged on her behalf. In the circumstances, the Tribunal considers that the

applicant has provided, or caused to be provided, to an officer, authorised system or the Minister the bogus document within the meaning of s 5(1)(b).

50. For these reasons, the Tribunal finds that there has been non-compliance with s101)(b) and s 103 in the way described in the s 107 notice.

Should the visa be cancelled?

51. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s 107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s 109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s 109(2).
52. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s 107 notice about the non-compliance and have regard to any prescribed circumstances: s 109(1)(b) and (c). The prescribed circumstances are set out in reg 2.41 of the Regulations. The Tribunal has considered each of the circumstances as follows.
53. The Tribunal raised these with the applicant at hearing and the evidence provided as well as written evidence provided is considered below.

The correct information

54. There is an obligation on the applicant to fill in her visa application form in such a way that all questions were answered correctly and no incorrect information given. The Tribunal has considered above her claim that her husband provided the incorrect information but has noted the obligation upon her not to provide incorrect information.
55. For the reasons outlined above, including the applicant's evidence at hearing, the correct information is that the applicant did not have funds from her parent, via a deposit in YES Bank in the sum of 56,645INR. The Tribunal does not have the correct information of funds the applicant's father held at the time of application. The applicant did not provide this evidence.
56. It does have information that her mother, Dalwinder Singh held a money deposit of 24,00,000INR as at 5 November 2022 in a 12 months fixed deposit account, created on 5 November 2022 with maturity date on 5 November 2023. As noted below this amount of funds would not have been sufficient to meet the cl 500.214 criterion.
57. This consideration weighs in favour of the exercise of the Tribunal's discretion to cancel the visa.

The content of the genuine document (if any)

58. The Tribunal has found, for the reasons outlined above, that the Fixed Term Deposit document in the name of Rashpal Singh issued by Yes Bank dated 30 January 2023 is a bogus document within the meaning of s 5(1)(b).
59. The Tribunal does not have the applicant's father's genuine bank documents at the time of application . The applicant did not provide this evidence.
60. The applicant has submitted a Fixed Term Deposit issued by Yes Bank in the name of her mother, Dalwinder Singh held a money deposit of 24,00,000INR as at 5 November 2022 in a 12 months fixed deposit account, created on 5 November 2022 with maturity date on 5

November 2023. As noted below this amount of funds would not have been sufficient to meet the cl 500.214 criterion.

61. The consideration weighs in favour of the exercise of the Tribunal's discretion to cancel the visa.

Whether the decision to grant a visa or immigration clear the applicant was based, wholly or partly, on incorrect information or a bogus document

62. One of the primary criteria for the grant of the Subclass 500 (Student) visa is that an applicant meets cl 500.214, the genuine access to funds criteria, which requires an applicant to meet their costs and expenses of their intended stay in Australia as well as that of any family member. Via the Financial Capacity Instrument LIN 19/98 evidence of financial capacity can relate to money deposits held by a family member. The Tribunal considers that the decision to grant the visa was based on the incorrect information and on the bogus document, specifically evidence of her father's funds held with YES Bank. It has considered all her claims in the response to the NOICC including that this document was genuine and the funds were withdrawn but for the reason above finds the document is bogus. And the funding information provided in the application as incorrect.
63. However, the applicant has provided evidence of a money deposit of 24,00,000INR as at 5 November 2022 in a 12 months fixed deposit account in the name of her mother. The exchange rate as at 23 February 2023 was 0. 01777 AUD to 1 NR. Therefore, as at the date of application 24,00,000INR amounted to \$42,468.
64. According to the Instrument Lin 19/198 at the time of application for the visa based on her studying the Master of Information Technology from 6 March 2023 to 2 March 2025 at a cost of \$35,200¹, she was required to provide evidence of access to sufficient funds in the sum of \$48,003, being calculated as follows.
- Living costs for her and her spouse being \$21,041 + \$7,362 = \$28,403
 - Course fees for the first 12 months = \$17,600
 - Travel expenses = \$2000 for return flight for both the applicant and her spouse
65. The Tribunal considers that even if the Department had the correct information and the genuine document it would not have been satisfied she had genuine access to sufficient funds available to meet the costs and expenses for the applicant and her spouse. The amount held by her mother at the time of \$42,468 does not meet the required amount of \$48,003. In making this assessment it has considered all the financial documents she has submitted in the response to the NOICC.
66. When raised with the applicant she said she only showed funds for herself; however at the time of application she was required to show funds not just for herself but for her spouse, a dependent applicant as they applied together at that time.
67. This factor significantly weighs in favour of the exercise of the Tribunal's discretion to cancel the visa.

The circumstances in which the non-compliance occurred

68. The non-compliance occurred when the incorrect information and bogus document, including evidence of funds held by her father with YES Bank, were provided in support of the

¹ As outlined in the COE submitted by the applicant in reply to the NOICC.

Subclass 500 Student visa application. The applicant contended at hearing that she was not aware the bogus document and incorrect information had been submitted as her husband, with whom she separated from soon after arriving in Australia, prepared with the agent the application for their visas. While alternate submission were made in the response to NOICC she said these were prepared by her agent, she did not speak very much English then and she wanted to stay in Australia. At hearing she did not continue to support the claims made in the response to the NOICC that the document and information were genuine.

69. Based on her lack of knowledge at the time the Tribunal gives this consideration weight in favour of exercising its discretion not to cancel the visa.

The present circumstances of the applicant

70. The relationship with her spouse has ended and she has filed for divorce. While there will be an effect on her spouse if the visa is cancelled as the relationship is over, he no longer would be entitled to the visa. The Tribunal gives this neutral weight.
71. The applicant said she is not working or studying as she had both a no-work and a no-study condition placed on her visa when her Student visa was cancelled on 18 October 2023. She said previously she was working in customer relations and had a good job and realised the value of independence.
72. The Tribunal accepts that she has been unable to study and achieve any course progress since the cancellation of the visa as she has a 'no study' condition placed on her Bridging visa. The applicant has said she wants to complete the Master of IT so she can be independent and not a burden on her family. She referred to the difficulties faced by women in India, particularly in her state of Punjab and wanting to study to be independent. She referred to her financial independence being affected if she is unable to complete the study and that she will incur financial, emotional and psychological hardship if the visa is cancelled. In her response to the NOICC she also referred to her parents' financial return being diminished if she is unable to complete her study and the burden placed on them if she has to return home.
73. The Tribunal raised with her via s 359AA the PRISMS record which indicates she came to study a Master of IT from 6 March 2023 but her enrolment was cancelled on 25 August 2023 for unsatisfactory course progress which was before she was sent the NOICC and she then enrolled in cookery courses. She said she suffered from hand and feet infections when she came to Australia, had health issues, stress and could not focus on her studies. She later said she failed 4/4 of the subjects undertaken in the Master of IT due to stress in her exams. She said she took enrolment in cookery courses because of the funds she had. She said her visa was cancelled and her migration agent suggested she study these courses. The evidence indicates enrolment in the cookery courses began on the same day the NOICC was sent. The Tribunal is of the view if she were at that time genuine in wanting to study in Australia to gain independence on return by completing a Master of IT she would not have enrolled in the cookery courses, being in a different area and at the vocational level, lower to the bachelor level which she completed in India. It views her enrolment in the cookery courses, as well as her poor study history in the Master of IT as undermining her claim that she was in Australia to study for the reasons she claims and enrolled in the cookery courses to prolong her stay in Australia and not for any value to her future.
74. The Tribunal is of the view she now genuinely wants to study in Australia and study for her future to be independent. It notes she can study a Master of IT course in India and she has already completed a Bachelor degree in India. It gives this low weight in exercising its discretion in favour of not cancelling the visa.

75.

76. It has also considered the effects on her family if her visa is cancelled. She has referred to the burden placed on them with her return. However, the Tribunal notes a Student visa is a temporary visa and she will have to return, albeit sooner if the decision to cancel the visa is affirmed.
77. The Tribunal gives this consideration weight in favour of exercising its discretion not to grant the visa.

The subsequent behaviour of the applicant concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

78. Nothing adverse is known about the applicant's behaviour concerning her obligations under the Act.

Any other instances of non-compliance by the applicant known to the Minister

79. As raised with the applicant via s 359AA there is evidence that enrolment was cancelled for unsatisfactory course progress on 25 August 2023 in the Master of Information Technology. The applicant indicated she failed 4/4 subjects she studied in the first semester as she was upset in her exams. She said she was very stressed and failed all the exams. She said they did not listen and cancelled her visa. The Tribunal notes that condition 8202(c) requires that the education provider does not certify an applicant for not achieving satisfactory course progress. The applicant claims the education provider did not follow the process and there is no evidence before the Tribunal concerning the process that led to the cancellation of her CoE for unsatisfactory course progress. It therefore cannot find that she has not complied previously with a condition of her visa.
80. In these circumstances the Tribunal gives this neutral weight.

The time that has elapsed since the non-compliance

81. The non-compliance occurred when the application was made on 23 February 2023. She arrived in Australia on 23 March 2023. While the Tribunal acknowledges that since this period the applicant has established herself in Australia, the Tribunal notes the applicant has been on notice, since being notified by the Department on 13 September 2023 that there was evidence of non-compliance with the visa application which may result in the cancellation of the visa.
82. In these circumstances the Tribunal gives this neutral weight.

Any breaches of the law since the non-compliance and the seriousness of those breaches

83. There is no information before the Tribunal which suggests that there have been breaches of law by the applicant since the non-compliance.

Any contribution made by the applicant to the community

84. At hearing the applicant indicated she had not contributed to the community although she attends the temple. The Tribunal gives this consideration neutral weight.
85. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government

policy. The relevant policy is set out in the Department's Procedural Advice Manual (PAM3) 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

86. *Whether there would be any consequential cancellations under s 140*

87. The applicant is married with no dependants. While her former spouse's visa would also be cancelled if the applicant's visa was cancelled, they are no longer in a relationship and she has filed for divorce. As they are no longer in a relationship he would no longer be entitled to a visa as her dependent. The Tribunal gives this factor neutral weight.

88. *Whether there are mandatory legal consequences, such as whether cancellation would result in the applicant being unlawful and liable to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention*

89. There are mandatory consequences in the case of the cancellation of the visa, including detention and removal from Australia, as well as difficulties in obtaining any further visas.
90. If the visa remains cancelled, the applicant would continue to hold a Bridging visa for a short period of time to allow her to finalise her affairs before returning to India, subject to any appeal of the Tribunal decision. If the applicant remained in Australia without a valid visa, she would be residing unlawfully and liable to detention and removal. The applicant, however, provided oral evidence to the Tribunal that she intended to comply with any lawful direction to depart Australia, and therefore the likelihood of the applicant being detained is remote.
91. If the visa is cancelled, the applicant may be subject to a restriction under s 48 of the Act and the applicant would be restricted to applying for a limited class of visas under the Act. Under public interest criterion (PIC) 4013 she also may not be granted a further visa for three years from the date of cancellation. The cancellation may also restrict the applicant's future ability to make a valid application for any visa other than those prescribed in reg 2.12 while onshore. There is no restriction on which visa she can apply for once she leaves Australia. However, these are also intended and legitimate consequences of cancellation.
92. The Tribunal gives this consideration neutral weight.

- *Whether Australia's international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation*

93. When asked by the Tribunal whether she had any fear of returning to India; she said she did not want to return to the environment in India. She became emotional and said because they did not understand. She said as there are three sisters and one brother in her family and her brother is deaf and dumb, she does not want to place any burden on her family and she cannot return to her in-laws as the relationship is over. She said she does not want to live in her parent's house and place the burden on them and in the future they may ask her to remarry. She said she does not want to spend her life in walls in a house. She said she wants to be independent but where she is from in India that is difficult. The Tribunal is of the view that her claims can be fully considered via a protection visa application if she fears the relevant harm on return. The Tribunal is of the view that this is the appropriate mechanism for assessing her claims if she fears return to India.

94. There is no information before the Tribunal that a decision to cancel the applicant's visa would be in breach of the Conventions of the Rights of the Child (CROC) or that it would be in contravention of the Convention Against Torture.

95. The Tribunal gives this consideration neutral weight.

Any other relevant matters (including the degree of hardship that may be caused to the applicant and any family members)

96. The Tribunal considers that the false information she provided to the Department in response to the NOICC that the document is genuine and her father held the funds in YES Bank is of concern, particularly as she provided this in a Statutory Declaration. It has considered her response that she did not want her visa to be cancelled, she wanted to finish her study, she was very shaken as her relationship had ended, her English was poor and that her evidence at hearing is the truth. Notwithstanding, that she is now telling the truth regarding the document and information, and the reasons she provided as to why she provided the false information in the response to the NOICC, the Tribunal is of the view she knew she was providing the false information. It views her past behaviour to the Department in not telling the truth in her response to the NOICC as significant. The Tribunal gives this weight in favour of exercising its discretion to cancel the visa.

97. When asked as to the degree of hardship that may be caused to her and any family members if the visa is cancelled, she referred to wanting to study to become independent. She said her brother is the youngest one in the family and he is deaf and dumb and there is no support from the government. She said her family are facing much from this and she does not want to place any burden on them and she wants to finish her study and start her life independently. The Tribunal accepts there would be added burden on her family as she will have to return earlier if the visa was cancelled and gives this factor some weight in favour of not cancelling the visa.

98. As to her claim that she does not want to return without completing her study so she can be independent and not live at home, the Tribunal notes its concern that in the past she enrolled in the cookery courses to prolong her stay in Australia and not for any value to her future. However, it views she now genuinely wants to study in Australia and study for her future to be independent. It notes she can study a Master of IT course in India and she has already completed a Bachelor degree in India. It gives this low weight in exercising its discretion in favour of not cancelling the visa.

99. The Tribunal has considered the totality of the applicant's circumstances. It has considered that she did not know the incorrect information and bogus document were provided, her present circumstances, why she wants to stay and study and why she does not want to return to India.

100. The Tribunal's concern is that the decision to grant the visa was based on incorrect information and a bogus document, being the applicant's father's fixed deposit summary with YES Bank. It has considered her claim that her mother had funds in the YES Bank at the time of the application but has determined there would not have been sufficient to meet cl 500.214. This factor weighs significantly in favour of the exercise of the Tribunal's discretion to cancel the visa.

101. The Tribunal found that the applicant had given incorrect information and a bogus document with his visa application and that he did not comply with s101 and s 103 of the Act. The Tribunal has found that there are grounds for cancelling his visa.

102. The Tribunal is satisfied that while there are aspects that are favourable to the applicant, however due to the seriousness of the breach and other factors outlined above, there are more matters and circumstances that weigh in favour of the exercise of the Tribunal's discretion to cancel the visa. The Tribunal is mindful of the seriousness of providing a bogus document, and the incorrect information as outlined above.
103. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s 107 of the Act. Having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

104. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Gabrielle Cullen
Senior Member

105. ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]² or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:

*This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

- (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
- (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.